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In the

Supreme Court of the United States

NATIONAL PARK HOSPITALITY ASSOCIATION,

Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT XANTERRA PARKS & RESORTS, LLC SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 applies to contracts between the National Park Service and private parties that provide concession services, including the development, operation, and maintenance of facilities, such as restaurants, lodges, and gift shops, in the national parks.

RULE 29.1 STATEMENT

Xanterra Parks & Resorts, L.L.C. is a Delaware limited liability company headquartered in Colorado. Xanterra Parks & Resorts, L.L.C. was previously named Amfac Resorts, L.L.C. Among other activities, Xanterra Parks & Resorts, L.L.C. provides concession services at the Grand Canyon National Park (South Rim) and at other national parks under concession contracts with the National Park Service.

At the time of the proceedings in the court of appeals, the following is a list of parent companies, subsidiaries, or affiliates of Amfac Resorts, L.L.C. that had outstanding securities in the hands of the public: Amfac Hawaii, L.L.C.; Arvida/JMB Partners, L.P.; Carlyle Real Estate Limited Partnership-XIII; Carlyle Real Estate Limited Partnership-XIV; Carlyle Real-Estate Limited Partnership-XV; JMB Income Properties, Ltd.-V; JMB/245 Park Avenue Associates, Ltd.; and JMB/Manhattan Associates, Ltd. Since that time, Amfac Resorts, L.L.C. underwent corporate restructuring and, as noted above, changed its name to Xanterra Parks & Resorts, L.L.C.

Although Xanterra Parks & Resorts, L.L.C. has several parents in the chain of corporate control, Xanterra Parks & Resorts, L.L.C. currently has no parents that have outstanding securities in the hands of the public.

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As petitioner the National Park Hospitality Association's ("NPHA") briefing makes clear, the erroneous D.C. Circuit decision below represents the consummation of prolonged (and unlawful) efforts by the National Park Service ("NPS"). Those efforts have had as their goal the undermining of the Contact Disputes Act ("CDA") and the protections it affords to NPS concessioners. The NPS's position, if accepted, would allow *all* contracting agencies to interpret, and freely attempt to exempt themselves from, the CDA. If permitted, such self-declared exemptions pose mortal dangers for the CDA regime as a whole: Congress enacted the CDA precisely because of the recognized need to ensure that government contractors enjoy access to neutral courts and the same fundamental rights as parties involved in private contract disputes. If, notwithstanding the CDA's plain terms, agencies are permitted to fashion clever devices for obtaining CDA exemptions, then the CDA's usefulness as a bulwark against agency overreaching will be diminished or perhaps ended. For the reasons below, and those in the NPHA brief, this Court should reverse the D.C. Circuit decision holding that the CDA does not apply to NPS concession contracts, and vacate the NPS's unlawful regulations.

STATEMENT OF THE CASE

A. The Contract Disputes Act

Congress enacted the Contract Disputes Act of 1978 to ensure the fair and efficient resolution of disputes between the Federal Government and government contractors. Before the CDA, "the 'system' for resolving federal contract disputes . . . [was] a mess." Clarence Kipps, Tom Kindness, and Cameron Hamrick, *The Contract Disputes Act: Solid Foundation, Magnificent System*, 4 Pub. Contract L.J. 585, 585 (1999). Disputes were resolved through a "mixture of

contract provisions, agency regulations, judicial decisions, and statutory coverage." S. Rep. No. 95-1118, at 2 (1978).

With no coherent system in place, "the methods and forums for handling such disputes" existed mainly "by executive branch fiat." *Id.* Government agencies took advantage of the unstructured system and were able to "circumscribe [] access" to courts by putting "terms and conditions in contracts that [were] not, in general, subject to negotiation." *Id.* at 5. For this and other reasons, the pre-CDA contracting system was "often too expensive and time consuming" and "fail[ed] to provide the procedural safeguards and other elements of due process that should be the right of litigants." *Id.* at 4. Contractors thus found themselves "caught in an irrational patchwork system that limited their access to court, failed to provide adequate due process protections, and often resulted in substantial delays." Kipps, *et al.*, *The Contract Disputes Act*, 4 Pub. Contract L.J. at 587; *see also* O. S. Hiestand, Jr. & William C. Parler, *The Disputes Procedure Under Government Contracts: The Role of the Appeals Boards and the Courts*, 8 B.C. Indus. & Commercial L. Rev. 1, 14 (1966) (discussing problems of the pre-CDA regime).

The CDA thus reflects critical steps taken by Congress to ensure access to courts, independent review of agency decisions, and that government contractors have the same fundamental rights as those available to parties involved in private contract disputes. *See generally* REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT (1972). Congress designed the CDA to "provide[] a fair, balanced, and comprehensive statutory system of legal and administrative remedies in resolving Government contract claims." S. Rep. No. 95-1118, at 1. It was Congress's intent that the CDA "have broad application in order to unify the

diverse and often inconsistent procedures" that had previously existed "among the many procuring agencies." *Id.* at 17.

To accomplish these goals, Congress reposited authority to administer the CDA not in the government agencies themselves (who are of course parties to government contract disputes), but in neutral arbiters—specifically, in the Court of Federal Claims and in independent agency boards of contract appeals (known as "BCAs"). *See* 41 U.S.C. §§ 606-609. Congress also included CDA provisions that ensure that disputes are resolved fairly and efficiently. Among other things, the CDA requires *de novo* review of agency contracting decisions, *see id.* § 609(a)(3), provides for interest on claims awarded by BCAs and courts, *see id.* § 611, grants BCAs subpoena, discovery, and deposition powers, *see id.* § 610, and establishes accelerated procedures for resolving smaller claims, *see id.* § 608.

Congress recognized that agencies would have strong incentives to subvert the CDA and attempt to prevent government contractors from benefiting from the CDA's procedural protections. Accordingly, Congress drafted the statute to make clear that the CDA applies "*notwithstanding any contract provision, regulation, or rule of law to the contrary.*" 41 U.S.C. § 609(a)(1) (emphasis added). Implementing this provision, courts have made equally clear that an agency cannot require a contractor to agree to waive rights granted under the CDA. *See Burnside-Ott Aviation Training Center v. Dalton*, 107 F.3d 854, 858-59 (Fed. Cir. 1997); *Oshco-Pae-Somc v. United States*, 16 Cl. Ct. 614, 619 (1989).

B. The NPS's Failed Attempts To Exempt Concession Contracts From The CDA

In the first appellate case on point, the NPS asserted that its concession contracts for obtaining visitor services in national parks are covered by all generally-applicable government procurement laws. In *Yosemite Park & Curry Co. v. United States*, 582 F.2d 552 (Ct. Cl. 1978), the predecessor to the Federal Circuit agreed with the NPS and held that the "broad concession granting authority of the Secretary of the Interior did not relieve the NPS of the duty of complying with generally applicable procurement statutes." *Id.* at 558.

Within a few years, however, the NPS reversed course, and began going to extraordinary lengths to exempt itself from the CDA. The NPS has litigated the issue of the CDA's applicability to NPS concession contracts in three separate cases before the Department of Interior Board of Contract Appeals ("IBCA")—and has lost every one. Indeed, until this case, every judge to consider the issue that we are aware of has rejected the NPS's position and held that NPS concession contracts are covered by the CDA. *See Watch Hill Concessions, Inc.*, IBCA No. 4284-2000, 01-01 BCA ¶ 31,298, 2001 WL 170911 (Feb. 16, 2001); *National Park Concessions, Inc.*, IBCA No. 2995, 94-3 BCA ¶ 27,104, 1994 WL 462401 (Aug. 18, 1994); *R&R Enters.*, IBCA No. 2417, 89-2 BCA ¶ 21,708, 1989 WL 27790 (Mar. 24, 1989), *aff'd on reconsideration*, 89-3 BCA ¶ 22,043, 1989 WL 75890 (Jul. 6, 1989). These IBCA decisions are binding on the NPS because of the authority delegated by the Secretary of the Interior to the IBCA to decide contract disputes, in addition to the authority granted to the IBCA by the CDA itself. The NPS has never appealed, much less successfully appealed, any of these adverse decisions.

Significantly, the IBCA's decisions on CDA applicability are fully consistent with similar on-point decisions of the Court of Federal Claims and the Federal Circuit. *See Total Med. Mgmt., Inc. v. United States*, 104 F.3d 1314, 1320 (Fed. Cir. 1997) (rejecting a similar position taken by the government with respect to medical services contracts); *Oroville-Tonasket Irrigation Dist. v. United States*, 33 Fed. Cl. 14 (1995) (concluding that a contract to manage a dam providing irrigation was covered by the CDA because contractor fulfilled responsibilities assigned by Congress to the Secretary of Interior). Moreover, as indicated in the NPHA brief, courts and other BCAs have, during this same timeframe, routinely applied the CDA to a myriad of disputes concerning contracts for services analogous to those provided by national park concessioners. *See* NPHA Br. at 25-26.

C. The 1998 Act And The NPS's Regulations

Against this backdrop, Congress passed the National Park Service Concessions Management Improvement Act of 1998 ("1998 Act"). The 1998 Act made significant changes to the concessions management system. In particular, Congress designed the 1998 Act to rejuvenate the management of NPS concessions, which Congress believed had become unduly bureaucratic and no longer reflected contemporary business practices. *See* S. Rep. No. 105-202, at 38 (1998). To this end, Congress instructed the NPS to "utilize concession contracts to authorize a person, corporation, or other entity to provide accommodations, facilities, and services to visitors to units of the National Park System." 16 U.S.C. § 5952.

The 1998 Act did not mention the CDA. It did not define concessions contracts as a special type of federal contract exempt from generally-applicable procurement laws. Nor

did it change the fundamental nature of concession contracting—as before, the NPS still contracted to have concessioners provide visitor accommodations, facilities, and services. Moreover, although the NPS continued to argue that the CDA should not apply to concession contracts, Congress included no language in the 1998 Act reversing the binding IBCA decisions that had already rejected the NPS's position on this point. While Congress expressly exempted concession contracts from other statutes, it did not exempt them from the CDA. *See* 16 U.S.C. § 5963 (stating that 40 U.S.C. § 303b does not apply to concession contracts); 16 U.S.C. § 17b (exempting concession contracts from the advertising requirements of 41 U.S.C. § 5).

Unwilling to accept and comply with its earlier litigating defeats, the NPS promulgated regulations implementing the 1998 Act that purport to exempt concession contracts from the CDA. *See* Concession Contracts, 65 Fed. Reg. 20,630 (Apr. 17, 2000) (JA 157-167). In the preamble to the regulations, the NPS boldly asserted that its regulations "supercede[d]" the IBCA's earlier binding decisions. *Id.* (JA at 164).

This latest NPS effort to evade the CDA has also been met with defeat before the Department of Interior's own Board of Contract Appeals. *See Watch Hill*, 2001 WL 170911. In *Watch Hill*, the IBCA thoughtfully considered—and ultimately rejected—all of the NPS's arguments for why the CDA is not applicable to concession contracts. In a carefully reasoned opinion, the IBCA stated that the contractor's "assertions that nothing has changed since [the IBCA's earlier decisions] seem[ed] considerably more accurate than NPS' twice-repeated, bold-faced-print, assertions that NPS' final rule, issued under the terms of the 1998 Act, 'supercedes'" those earlier decisions. *Id.* at *5.

The IBCA noted that "Congress determined in the CDA that a neutral adjudicator—*i.e.*, this Board—ought to resolve" contract disputes. *Id.* at *6. It then held that "in any concession contract where the concessioner is required to perform specific services or to make specific improvements to the land it occupies . . . , the contract is a procurement contract, subject to the Contract Disputes Act." *Id.* Accordingly, the NPS position in this case remains squarely at odds with that of the adjudicative body most directly responsible for applying the CDA to NPS concession contracts.

D. The Opinions Below

In November and December 2000, the NPHA, Xanterra Parks & Resorts, L.L.C. (which was then named Amfac Resorts, L.L.C.), and two other concessioners filed separate actions under the Administrative Procedure Act challenging the NPS's regulations and Standard Concession Contract. Among other things, the NPHA, Xanterra, and the other concessioners contended that the NPS's regulations were arbitrary, capricious, and otherwise contrary to law. They argued that, although the NPS had no authority to administer the CDA, its regulations improperly purported to exempt NPS concession contracts from the CDA, thereby depriving contractors of the CDA's essential protections.

As litigation progressed, the NPS acknowledged that its regulations were unlawful in several respects and agreed to revise them. The NPS refused, however, to eliminate the provisions relating to CDA applicability, even after its own Board of Contract Appeals had determined, in the *Watch Hill* case, that those regulations were unlawful. *See Watch Hill*, 2001 WL 170911.

On May 23, 2001, the district court granted summary judgment in the NPS's favor on most of the concessioners' remaining claims. In particular, it deferred to the NPS's interpretation that the CDA does not apply to concession contracts. *See* Pet. App. 68a-72a. It reached that decision, even though it determined that, under concession contracts, the NPS is "receiving services," and "bargaining for the maintenance of real property." Pet. App. 68a. The court concluded that, because concession contracts differ from "typical procurement contracts," the CDA was ambiguous. *Id.* The Court then deferred to the NPS's interpretation under *Chevron*. *See* Pet. App. 70a.

The court of appeals for the D.C. Circuit affirmed. It began, however, by rejecting the district court's reasoning, recognizing instead that the NPS "does not administer the Contract Disputes Act.," Pet. App. 27a, and, therefore, is not entitled to *Chevron* deference. But instead of striking down the regulations as outside the scope of the NPS's delegated authority, the D.C. Circuit proceeded to uphold them. Relying on an orphaned statement in the 1998 Act's legislative history, the court concluded that concession contractors are not entitled to the protections of the CDA because "the primary purpose of concessions contracts is" to provide services to park area visitors. Pet. App. 29a. According to the court, "[t]hat the government receives monetary compensation or incidental benefits from the concessioners' performance is not enough to sweep" concession contracts "into the ambit" of the CDA. *Id.*

SUMMARY OF ARGUMENT

1. It is well-settled, as a matter of venerable constitutional and administrative law principle, that an executive agency may not promulgate even reasonable

regulations that claim the force of law, unless Congress has specifically delegated it the authority to issue those regulations. Indeed, the Administrative Procedure Act expressly requires a court to "hold unlawful and set asid[e]" agency action that exceeds the scope of the agency's "statutory jurisdiction." 5 U.S.C. § 706(2)(C). It is therefore remarkable that, in this case, the D.C. Circuit, on the one hand, correctly found that the NPS "does not administer the Contract Disputes Act, and thus may not have interpretative authority over its provisions," Pet. App. 27a, but, on the other hand, failed to grasp the dispositive implications of this finding. Because Congress has not granted the NPS delegated authority to administer the CDA, the NPS regulations purporting to govern CDA applicability should be vacated.

2. The NPS regulations declaring concession contracts exempt from the CDA reflect in any event an impermissible construction of the CDA. The CDA by its terms applies to "any" contract entered into by an executive agency for the procurement of services; property; or the construction, alteration, repair or maintenance of real property. 41 U.S.C. § 602(a). NPS concession contracts fit comfortably within this statutory ambit. They *require* concessioners to provide certain services for the benefit of the NPS and park visitors, and they often *require* the construction of new buildings for the NPS, or the repair and maintenance of existing NPS buildings.

The NPS nonetheless argues that concession contracts are not covered by the CDA because they constitute a species of government "permits" that merely "authorize third parties to provide services to park area visitors." Pet. App. 27a, 69a. But this contention bears no relation to the undisputed and public record regarding the manner in which

the NPS runs its concessions program. Unlike "permits" (which by definition are permissive, not mandatory), NPS concession contracts are subject to pervasive NPS oversight and impose affirmative performance obligations on concessioners (that conform, both in substance and in their solicitation, to specific statutory requirements embodied primarily in the 1998 Act). Accordingly, because disputes over concession contracts (unlike disputes over permits) are likely to involve questions going to the adequacy of performance, the CDA's due process protections and uniform procedures are critically important.

The NPS has no meaningful response to this plain reading of the CDA, nor has it provided any persuasive policy reasons why NPS concessioners should not be entitled to the essential contractual protections that Congress has guaranteed. The NPS instead relies on flimsy and irrelevant distinctions, unmoored to the CDA's plain language, and on an orphaned statement from post-CDA legislative history. But, as this Court has repeatedly held, such formalistic distinctions and suspicious post-enactment history are not to be taken seriously, much less given decisive weight.

ARGUMENT

I. THE NPS REGULATIONS SHOULD BE VACATED BECAUSE THE NPS HAS NO AUTHORITY TO ADMINISTER THE CDA

An administrative agency's power to promulgate binding regulations is subject to fundamental constraints limiting those powers to authority delegated by Congress. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Regulations that exceed the scope of an agency's delegated authority are unlawful and cannot stand. *See* 5 U.S.C. § 706(2)(C). Indeed, without statutory authorization, an

agency may not "promulgate even reasonable regulations that claim the force of law." *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002).

Here, the Government has failed to point to any statute granting it delegated authority to issue binding regulations governing CDA applicability. In fact, it has failed seriously to contest the D.C. Circuit's conclusion below that the NPS does not in any relevant sense administer the CDA. *See* Pet. App. 27a. These fundamental omissions are fatal to the challenged NPS regulations. Because the NPS has acted beyond its delegated authority, its regulations must be set aside as *ultra vires*—quite apart from the independent grounds for invalidating them as an impermissible CDA construction.

A. An Agency Literally Has No Power To Act Unless And Until Congress Confers Power Upon It

Our Constitution is grounded in the bedrock of a defined and limited delegation of legislative power from the people to the Congress. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). As Chief Justice Marshall described it, the people's "original and supreme will organizes the government and assigns to different departments their respective powers." *Id.* In particular, the "*powers of the legislature are defined and limited*; and that those limits may not be mistaken or forgotten, the constitution is written." *Id.* (emphasis added).

This elemental constitutional precept applies in turn to executive agencies acting within the modern administrative state. Since legislative power under the Constitution comes ultimately by way of delegation from the people, it may come to rest in executive agencies only via valid statutory delegations from Congress, the repository of the people's

lawmaking authority in the first instance. This Court has accordingly recognized that "an agency literally has no power to act . . . unless and until Congress confers power upon it." *New York v. FERC*, 122 S. Ct. 1012, 1023 (2002) (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)). Instead, it is "axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen*, 488 U.S. at 208.

It follows that in instances where, as here, an agency is denied *Chevron* deference on grounds that it does not administer a statute at all, that agency will necessarily lack authority to promulgate binding regulations governing the statute's applicability. The Court has recognized, to be sure, that some statutory delegations confer agency authority to act, but fall short of meriting full *Chevron* deference. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (granting *Chevron* deference only where Congress has delegated authority to make rules carrying the force of law, and "the agency interpretation claiming deference was promulgated in exercise of that authority"). In other words, while a congressional delegation is a "precondition" for *Chevron* deference, *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990); *see also Williams v. Taylor*, 529 U.S. 362, 387 n.13 (2000) ("[d]eference after the fashion of *Chevron* depends on delegation"), it is not a *sufficient* condition for deference. *See Mead Corp.*, 533 U.S. at 226-27.

What is remarkable here is that the D.C. Circuit failed to recognize that a congressional delegation, while perhaps not *sufficient* to confer lawmaking authority, is absolutely *necessary* for such authority. Hence, even as it reversed the district court and found that the NPS "does not administer the Contract Disputes Act, and thus may not have

interpretive authority over its provisions," Pet App. 27a, the D.C. Circuit failed to grasp the dispositive implications of this finding. Specifically, it failed to grasp that if the NPS lacks authority to administer the CDA, it also and necessarily lacks authority to issue binding regulations governing CDA applicability.

This straightforward conclusion is reinforced by the plain language of the Administrative Procedure Act. The APA expressly requires courts to "hold unlawful and set aside agency action" that exceeds the scope of an agency's "statutory jurisdiction" or "authority." 5 U.S.C. § 706(2)(C); *cf. Vallely v. Northern Fire & Marine Ins. Co.*, 254 U.S. 348, 353 (1920) (noting that because courts "are constituted by authority," if they act beyond their authority "their judgment and orders are regarded as nullities."); *Burnham v. Superior Court of California*, 495 U.S. 604, 608-09 (1990) (discussing history of rule that a judgment of court lacking jurisdiction is void). Tellingly, however, this basis for invalidating agency action is enumerated separately from the independent APA provision envisioning invalidations of agency actions "not in accordance with law." 5 U.S.C. § 706(2)(A). Here again, the D.C. Circuit should have recognized that, having held that the NPS's regulations "exceeds the scope of" the agency's "statutory jurisdiction," it was bound to set them aside quite apart from any questions of whether or not the NPS's particular statutory construction was or was not "in accordance with" the CDA. 5 U.S.C. § 706(2)(A), (C).

The D.C. Circuit's mistake is all the more puzzling in light of the fact that lower courts, including the D.C. Circuit itself, have heretofore successfully applied this Court's cases involving questions of agencies overstepping statutory delegations of authority. Settled D.C. Circuit law at the time of the decision below provides that, absent statutory

authorization, an agency's action "cannot stand." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). In fact, the D.C. Circuit's caselaw rightly goes further still and emphasizes that courts should not "lightly presume[]" such delegated authority. *Id.* at 1082. As this Court's cases make clear, Congress must affirmatively authorize (either expressly or impliedly) an agency to make rules carrying the force of law. The mere fact that Congress has not *withheld* such authority is not a sufficient indication that Congress intended to delegate lawmaking powers to an agency. *See Adams Fruit*, 494 U.S. at 649 (rejecting the view that Congress's "failure to speak directly . . . creates a statutory 'gap' within the meaning of *Chevron*"). Instead, far more is required: "Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron*, [*Mead*,] and quite likely with the Constitution as well." *Michigan v. EPA*, 268 F.3d at 1082 (quoting *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) (emphasis in original)).

With the exception of its unexplainable decision below, the D.C. Circuit itself has successfully applied these bedrock principles time and again to invalidate agency regulations promulgated in the absence of delegated authority. In *Motion Picture Association of America, Inc. v. FCC*, for example, the D.C. Circuit addressed the validity of video description regulations promulgated by the FCC to improve programming for hearing and visually impaired individuals. *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002). Relying on *Chevron* and *Mead*, the court held that because the FCC was unable to cite any statutory provision granting it this authority, the challenged FCC regulations had to be vacated. *See Motion Picture Ass'n*,

309 F.3d at 799. It made no difference, the court explained, that Congress had not "positively foreclose[d] agency rules mandating video description." *Id.* at 802, 805-06. Nor did it matter that the agency's rules may have been "highly salutary." *Id.* at 807. Rather, as the court succinctly noted, "[a]n agency may not promulgate even reasonable regulations that claim a force of law without delegated authority from Congress." *Id.* at 801. In *Atlantic City Electric Co. v. FERC*, the D.C. Circuit relied on very similar reasoning to vacate certain FERC regulations, admonishing FERC for attempting to deny affected electric utilities "the very statutory rights given to them by Congress." *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002). And, in *Kelley v. EPA*, the D.C. Circuit vacated EPA regulations that it had determined exceeded that agency's delegated authority under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). *See Kelley v. EPA*, 15 F.3d 1100 (D.C. Cir. 1994). *Kelley* explained that, although EPA could enact policy statements to "guide EPA's enforcement proceedings across the country," it could not take its policy positions, however reasonable, and enact them as binding legislative or interpretive rules carrying the force of law. *Kelley*, 15 F.3d at 1109; *see also Mead*, 533 U.S. at 234-35 (noting that interpretations contained in policy statements, agency manuals, and enforcement guidelines, as opposed to rulings intended to have the force of law, may be entitled to *Skidmore* deference.)

In sum, the D.C. Circuit, with the exception of the decision below, has properly applied this Court's administrative law precedents in holding that certain FCC, FERC, and EPA regulations were subject to vacatur—quite apart from arguments as to whether they reflected textually

permissible statutory constructions. Until the D.C. Circuit's puzzling decision below, no administrative law decision of this Court, or of the D.C. Circuit implementing this Court's precedents, had ever purported to uphold agency regulations promulgated in an acknowledged absence of a statutory delegation of authority. The D.C. Circuit's decision undermining this fundamental principle—traceable ultimately to Justice Marshall and the Founding—is seriously flawed and should be reversed.

B. Because Congress Did Not Delegate Authority Over The CDA To The NPS, The NPS's Regulations Exceed Its Statutorily Defined Grasp

Here, the NPS regulations should be vacated because Congress did not delegate authority to the NPS to administer the CDA, but instead assigned administrative authority over the CDA to the BCAs and to the Court of Federal Claims. *See* 41 U.S.C. §§ 606-609; *see also* S. Rep. No. 95-1118, at 12-13. The only executive authority delegated by Congress under the CDA is to the Office of Federal Procurement Policy, which is allowed only to "issue guidelines with respect to criteria for the establishment, functions, and procedures of the agency boards" and to establish inflation indices for the value of "small claims." 41 U.S.C. §§ 607(h), 608(f). Congress thus "expressly established" the judiciary, and not the NPS, "as the adjudicator of private rights of action arising under the statute." *Adams Fruit*, 494 U.S. at 649; *see also Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in judgment) (rejecting *Chevron* deference where the statute "is not administered by any agency but by the courts").

Congress also made plain its intent to prevent agencies from usurping the BCAs' and Court of Federal Claim's role as neutral arbiters of contract disputes. The CDA

unambiguously states that "a party to a Government contract other than the Government" has the right to appeal any contract dispute to the agency board, or to bring a claim in the United States Court of Federal Claims "*notwithstanding any* contract provision, *regulation*, or rule of law to the contrary." 41 U.S.C. § 609(a)(1) (emphasis added).

Accordingly, because NPS has not been entrusted to administer, and thus has no authority to interpret, the CDA, its regulations exceed the scope of its delegated authority. Congress no more intended for NPS to establish binding regulations purporting to cut back the scope of the CDA, than it did for the NPS to issue regulations cutting back the scope of the APA. *Cf. Bowen*, 488 U.S. at 214 (Scalia, J., concurring) (agencies cannot engage in retroactive rulemaking when Congress prohibited it under the APA). Having correctly determined that the NPS "does not administer the [CDA]," Pet. App. 27a., the D.C. Circuit should have set aside the NPS regulations on grounds that the NPS had no authority to deny concessioners "the very statutory rights given to them by Congress." *Atlantic City Elec.*, 295 F.3d at 9.

Perhaps sensing the D.C. Circuit's mistake, the Government tepidly suggests that the NPS's authority to determine CDA applicability derives, not from the CDA itself, but from the 1998 Act. *See* Br. in Opp'n, at 16 ("[T]he court of appeals did not attempt to add limiting language to the CDA, but rather faithfully interpreted the language of the 1998 Act."). But this position too—if indeed the Government embraces it—cannot plausibly be maintained. At the outset, the 1998 Act does not mention the CDA, and this congressional "failure to speak" to the issue is dispositive. *Adams Fruit*, 494 U.S. at 649. Indeed, the Court in *Adams Fruit* held that that, although Congress "clearly

envisioned" a role for the Department of Labor in promulgating standards implementing the Migrant and Seasonal Agricultural Worker Protection Act, that delegation did not "empower" the agency "to regulate the scope of judicial power vested by the statute." *Id.* at 650. "It is fundamental," the Court explained, "that an agency may not bootstrap itself into an area in which it has no jurisdiction." *Id.* (citation omitted). Just so here. Although Congress expressly mandated a role for the NPS in administering the 1998 Act, it did not empower the NPS to regulate the scope of judicial power vested by an entirely different statute—the CDA.

More fundamentally, the NPS's position has no logical stopping point. This Court must be clear that any NPS attempts to rehabilitate the D.C. Circuit decision in this manner would effectively ask the Court to "presume a delegation of power" rendering the CDA a nullity. *Michigan v. EPA*, 268 F.3d at 1082. (emphasis omitted). Because any federal agency may enter into contracts for goods and services within their respective authorization and available appropriations, *see, e.g.*, *United States v. Corliss Steam-Engine Co.*, 91 U.S. (Mem.) 321 (1875), the NPS's position, if accepted, apparently would allow *all* contracting agencies to interpret, and freely attempt to exempt themselves from, the CDA or any other generally-applicable procurement law.

Fortunately, Congress itself recognized that agencies might well succumb to the attractions of a self-declared CDA exemption and also recognized the mortal dangers such self-declared exemptions would pose for the CDA regime as a whole. Congress was therefore careful to establish that CDA procedures and protections apply "notwithstanding any contract provision, regulation, or rule of law to the contrary." 41 U.S.C. § 609(a)(1). Hence, even assuming that the 1998

Act otherwise would supply grounds for exercising a power of CDA-exemption—which it does not—that implied power is foreclosed by express language in the CDA itself. The challenged NPS regulations are thus *ultra vires*, and subject to vacatur, under the plain terms of the CDA itself.

II. THE NPS REGULATIONS ARE ALSO CONTRARY TO THE CDA'S PLAIN TERMS

In addition to being beyond the NPS's delegated authority, the agency's regulations also reflect an impermissible construction of the CDA. As demonstrated below, and in the NPHA's brief, the CDA applies by its terms to NPS concession contracts, thus rendering the NPS regulations plainly "not in accordance with law." 5 U.S.C. § 706(2)(A).

A. The CDA By Its Terms Applies To NPS Concession Contracts

As the NPHA briefing emphasizes, the CDA is broadly worded to cover a wide range of government contracts. It applies by its terms to "*any* express or implied contract" entered into by "an executive agency" for "the procurement of" (1) "property, other than real property in being," (2) "services," or (3) the "construction, alteration, repair or maintenance of real property" 41 U.S.C. § 602(a) (emphasis added). NPS concession contracts fit comfortably within this statutory ambit. As the NPHA explains in detail, the CDA's plain language, structure, and background all confirm the CDA's applicability to concessions contracts. The overwhelming weight of decisional authority thus rightly rejects the NPS's persistent efforts to circumvent the CDA and holds instead that "in any concession contract where the concessioner *is required to perform specific services or to make specific improvements* to the land it occupies, . . . the

contract is a procurement contract, subject to the [CDA]." *Watch Hill Concessions Inc.*, IBCA No. 4284-2000, 01-01 BCA ¶ 31,298, 2001 WL 170911, at *6 (Feb. 16, 2001); *National Park Concessions, Inc.*, IBCA No. 2995, 94-3 BCA ¶ 27,104, 1994 WL 462401, at *14 (Aug. 18, 1994). Indeed, as even the NPS must concede, it is difficult to imagine a concession contract that does not at least require the concessioner to perform specific services.

Before the D.C. Circuit, the NPS conceded that concessions contracts require concessioners to provide services and goods. It nonetheless successfully undermined the CDA by convincing that court (inexpert as it is on government contracts issues) that concession contracts are not "procurement" contracts. According to the NPS, concession contracts instead merely "authorize third parties to provide services to park area visitors." Pet. App. 27a, 69a. They accordingly, in the NPS view, constitute a species of government permits to operate businesses on government property. *See* Br. in Opp'n, at 5.

The striking fact about this contention is that it bears no relation either to the undisputed and fully public record respecting the manner in which the NPS runs its concessions contracting program, or the statutory framework upon which that program rests. This Court is well familiar with the type of relationship established between governments and private parties pursuant to permits. *See Watchtower Bible and Tract Society v. Village of Stratton*, 536 U.S. 150 (2002) (striking down ordinance requiring permit to engage in door-to-door canvassing); *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002) (addressing constitutionality of permit requirement for conducting large-scale public events); *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) (recognizing that "government, in order to regulate competing uses of

public forums, may impose a permit requirement on those wishing to hold a march, parade, or rally"); *Secretary of the Interior v. California*, 464 U.S. 312 (1984) (discussing permits required for the offshore exploration, production, and development of oil and gas). Moreover, the NPS itself is familiar with the critical distinction between permits and concessions contracts, as a result of the many situations in which it issues permits to regulate competing uses of park lands. *See* 36 C.F.R. § 7.96(b) (permit required for organized games in park areas); 36 C.F.R. § 7.96(c) (permit required to fly a model powered plane from any park area); 36 C.F.R. § 7.96(f) (permit required to operate certain commercial vehicles and common carriers on the George Washington Memorial Parkway); 36 C.F.R. § 7.96(g) (permit required for demonstrations or special events in park areas); 36 C.F.R. § 13.65 (permit required to engage in commercial fishing at Glacier Bay National Park).

As these examples together suggest, a "permit," most properly speaking, is "a document or certificate giving permission to do something." WEBSTER'S II NEW COLLEGE DICTIONARY (1995); *see also* BLACK'S LAW DICTIONARY (7th ed. 2000) (permit: "A certificate evidencing permission; a license") Unlike contracts involving *procurements*, "permits" do not impose affirmative obligations of performance; permits are permissive, not mandatory. Permits are required, for example, as a precondition to the sale or distribution of merchandise in certain park areas in Washington, D.C. *See* 36 C.F.R. § 7.96(k). But precisely because such merchandise is sold pursuant to permits, not concessions contracts, the permit-holder has no affirmative obligation to sell anything—performance is entirely within the permit-holder's discretion. And precisely because the government has no authority to require affirmative

performance, the sorts of dangers that the CDA was enacted to remedy—in particular, the risk of government contracting officers illegitimately demanding over-performance by contracting partners as a way of supplementing scarce appropriated funds—are greatly diminished. Disputes over permits are much more likely to concern the scope or validity of the permit itself, as opposed to intractable issues going to the adequacy of affirmative performance.

Given the policy reasons for the CDA's inclusion of procurements of services like NPS concessions contracts (which, unlike permits, impose affirmative performance obligations), it is not surprising that contracts for procurements typically are quite different from permits. For instance, unlike typical permits, NPS concession contracts are affirmatively solicited by the NPS, and take the form of binding, bilateral, written contracts. And unlike permits, NPS concession contracts are minutely tailored to impose affirmative obligations on concessioners that must be performed to the NPS's satisfaction. *See* Standard Concession Contract § 16, 65 Fed. Reg. 26,052, 26,072 (May 4, 2002). In the world of NPS concession contracting, it is therefore not unusual for factual disputes to arise over questions of performance. *See, e.g.*, *Watch Hill*, 2001 WL 170911 (noting that the NPS and its concessioner disagreed over whether the concessioner had breached the contract); *National Park Concessions*, 1994 WL 462401 (disagreement over allegedly defective specifications provided by the NPS under concessions contract).

Moreover, under NPS concessions contracts, unlike permits, the NPS is intimately involved in private business operations. NPS concessions contracts *require*—as opposed to simply permitting—concessioners to provide specific services for the benefit of the NPS and park visitors. *See*

Watch Hill, 2001 WL 170911, at *6. They also often *require* the construction of new buildings for the NPS, or the repair and maintenance of existing NPS buildings. In fulfilling these contractual obligations, the concessioner is subject to pervasive government oversight. Failure to perform to the NPS's satisfaction is grounds for termination if the NPS finds the concessioner has materially breached. *See generally* Standard Concession Contract § 16, 65 Fed. Reg. at 26,072.

The recently-terminated contract between the NPS and Hamilton Stores for concession services at Yellowstone National Park is typical of NPS concessions contracts. *See* Yellowstone Contract, No. 14-10-9-900-227 (executed Apr. 20, 1970) (the Yellowstone Contract is included in the record below, and a copy has been lodged with the Court). Under that contract, the NPS procured a wide-range of services. For example, the Yellowstone concessioner was *required*—not simply permitted—to provide merchandising services; food and beverage service; automobile service stations; photographic facilities and services; as well as studios, shops and stands for the purpose of selling pictorial souvenirs, maps, and recordings. *See* Yellowstone Contract § 2. In addition, the concessioner was *required* (subject to NPS oversight and approval) to undertake a substantial improvement and building program. *See* Yellowstone Contract § 1.

Under the Yellowstone contract, it was the NPS, not the private concessioner, who was in the driver's seat in controlling business operations. The NPS "reserve[d] the right to determine and control the nature and type of merchandise and services which may be sold or furnished by the Concessioner within the park." *Id.* § 2(b). Likewise, all rates and prices charged for such services were "subject to

regulation and approval by the Secretary." *Id.* § 3(b). If the concessioner failed to perform any one of these services or requirements to the NPS's satisfaction, the contract gave the NPS sole authority to terminate the contract at its discretion. *See* Yellowstone Contract § 11 ("[T]he Secretary shall have the power to determine whether there has been a default or unsatisfactory performance.").

Precisely because the government enjoys broad discretion over NPS concession contracts and other contracts reflecting procurements of services, and because such contracts are typically agency-drafted and non-negotiable, the CDA's due process protections and uniform procedures are critically important. When a concessioner's failure to fulfill the NPS's performance expectations is grounds for the NPS seeking to cancel a contract outright, *de novo* review by an impartial adjudicator is essential to protect the concessioner. *See Watch Hill*, 2001 WL 170911, at *6 ("Congress determined in the CDA that a neutral adjudicator . . . ought to resolve [] disputes" relating to the liabilities the NPS incurs when it terminates a contract). Likewise, because disputes over adequacy of performance can continually arise in these close working relationships, the CDA provides efficient and cost-effective procedures for resolving recurring claims. *See* S. Rep. No. 95-1118, at 2. As Congress itself recognized, absent CDA protections, it would be all too easy for the NPS and other government agencies to "circumscribe access" to the impartial courts. *Id.* at 2. Ironically, that is exactly what the NPS obtained below from the D.C. Circuit.

B. The NPS Has Provided No Legitimate Reason For Exempting NPS Concession Contracts From The CDA

The NPS has no meaningful response to this plain reading of the CDA, nor has it provided any persuasive policy reasons why NPS concessioners should not be entitled to the essential protections that Congress has guaranteed them. The NPS instead relies on formalistic distinctions and post-enactment legislative history entirely lacking in persuasive force.

1. It Makes No Difference That The NPS Does Not Make Payments To The Contractor

The NPS initially argues that the CDA does not apply because the NPS does not make payments directly to concession contractors. *See* Br. in Opp'n, at 12-13. This distinction is irrelevant, however, because nowhere in the statute is CDA coverage made conditional on the disbursement of government funds. So long as the government procures services—whether through direct payment or not—the CDA applies. *See Bonneville Assocs. v. United States*, 43 F.3d 649, 653 (Fed. Cir. 1994) (a "procurement" is "an acquisition by purchase, lease, or barter, or property or services"); *see also* NPHA Br. at 27-29.

Moreover, the NPS's distinction irrationally exalts form over substance. Congress has ensured by statute that concessioners will in fact receive payment for the services they contract with the government to provide. The 1998 Act provides, for example, that upon expiration or termination of a concessions contract, a concessioner is entitled "under the terms of the concessions contract to receive from the United States or a successor concessioner the value of any leasehold

surrender interest in a capital improvement as of the date of such expiration or termination." 16 U.S.C. § 5954(c). Likewise, the NPS is obligated under the 1998 Act to ensure that a concessioner has "a reasonable opportunity for net profit in relation to capital invested and the obligations of the contract." 16 U.S.C. § 5956. The NPS is therefore statutorily *obliged* to ensure that concessioners obtain both a return *of* their investment at the end of the contract, and a reasonable opportunity to make a fair return over the contract term. The hollowness of the NPS formalisms is therefore apparent: Congress gave statutory assurances of proper payment, thus making irrelevant whether those payments are made directly or indirectly to concessioners.

2. It Makes No Difference That NPS Contracts Also Benefit The Public

The NPS also suggests that concession contracts are not covered by the CDA because they do not directly benefit the government. *See* Br. in Opp'n, at 14. This distinction, too, is irrelevant under the CDA, which applies by its terms to *any* contract for procurement of services, not just contracts that might principally benefit the government. *See* 41 U.S.C. § 602; *see also* NPHA Br. at 29-36.

But even assuming the CDA were rewritten as the NPS advocates, the NPS arguments still would fail. The fact is that the NPS as an agency greatly benefits from NPS concession contracts. *First*, as the NPHA brief emphasizes, NPS concession contracts are essential means of the NPS fulfilling its mandate to "provide for the enjoyment" of the national parks, 16 U.S.C. § 1, and "conserve the scenery and the natural and historic objects and the wild life therein," while providing "for the enjoyment of the same.'" Pet. App. 49a (quoting 16 U.S.C. § 1). The 1998 Act thus establishes that the NPS is statutorily *required* to "administer units of

the National Park Service in accordance with the fundamental purpose of conserving their scenery, wildlife, and natural and historic objects, and providing for their enjoyment in a manner that will leave them unimpaired for the enjoyment of future generations," 16 U.S.C. § 5951, and statutorily *required* to "utilize" concession contracts to achieve these objectives. *See* 16 U.S.C. § 5952. The important point, then, is that Congress itself envisioned the NPS's use of concessions contracts in fulfilling its mission. *See Total Med. Mgmt., Inc. v. United States*, 104 F.3d 1314, 1320 (Fed. Cir. 1997) (rejecting argument that agreements between the military and a private health care company to provide medical services to military dependants were not subject to the CDA simply because they did not directly benefit the government). The NPS derives incalculable benefits by having private parties efficiently provide congressionally-mandated services and goods, rather than having to expend its own appropriated funds to provide these services itself. *See R & R Enterprises*, 1989 WL 27790, at *1 ("a concessionaire contract entered into by NPS is a procurement contract subject to the CDA, since it is for services that the Government itself would otherwise provide"). There could hardly be better evidence that NPS concessions contracts indeed benefit the government.

Second, even beyond its statutory mission, concession contracts directly benefit the NPS as an organization. NPS concessioners pay the NPS a percentage of gross receipts as franchise fee payments that go directly into NPS accounts, as opposed to general revenues. *See* Standard Contract § 11, 65 Fed. Reg. at 26,069. These franchise fee payments are significant, and they are relied on by the NPS to support activities throughout the park system. *See* 16 U.S.C. § 5956(c), (d). As the legislative history to the 1998 Act

makes clear, NPS revenues from concessions contracts have steadily increased, *see* S. Rep. No. 105-202, at 20, reaching almost $50 million annually by 1996. *See id.* Moreover, many NPS concession contracts require concessioners to undertake construction projects under contracts providing that "[t]he United States retains title and ownership to all Concession Facilities." *See, e.g.*, Grand Canyon Contract, No. 14-10-0-900-158, § 2(e) (executed Mar. 26, 1969). For example, under its current contract for Grand Canyon National Park, Xanterra is required to make approximately $8.5 million in improvements to buildings and structures inside national park boundaries. *See* NPHA Br. at 23 (citing JA 95-95). This construction, like the millions the NPS receives in franchise fee payments, directly inures to the NPS's benefit.

3. The Post-CDA Legislative History Relied On By The NPS Is Irrelevant

Given the clarity of the CDA, and the flimsy and formalistic distinctions that the NPS cites to undermine it, it is not surprising that the NPS relies in the end on an orphaned statement found planted in the 1998 Act's legislative history. *See* S. Rep. No. 105-202, at 39; H.R. Rep. No. 105767, at 43 (1998). According to the NPS, legislative history from the 1998 Act purporting to interpret the scope of the CDA "confirms that Congress . . . distinguished concession contracts from ordinary procurement contracts." Br. in Opp'n, at 15.

Whatever role legislative history might typically play in statutory interpretation, it surely deserves no role here. The 1998 Act contains no statutory language that could possibly be construed to modify the CDA's scope. This situation is therefore governed by this Court's decisions holding that legislative history appearing in a later statute should not be

taken seriously when it purports to redefine earlier legislation. Such post-enactment legislative history has little—if any—value. *See generally Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 & n.13 (1980); *see also Wright v. West*, 505 U.S. 277, 295 n.9 (1992) (expressing "grave doubts" whether post-enactment legislative history "is of any value"); *Sullivan v. Finkelstein*, 496 U.S. 617, 628 n.8 (1990) (acknowledging the inherent difficulties in relying on subsequent legislative history).

More fundamentally, there are substantial dangers in letting agencies circumvent plain statutory terms through opportunistic reliance on subsequent "legislative" history that may in fact have been promoted by the agency itself. *See GTE Sylvania, Inc.*, 447 U.S. at 117-118 (reiterating the "oft-repeated warning" that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one") (citation omitted); *see also Commissioner Internal Revenue v. Engle*, 464 U.S. 206, 223 n.21 (1984) (giving no weight to "deliberations in subsequent sessions of Congress[] that never culminated in legislation"). Consider, for example, the recent, well-publicized controversy over personnel protections for federal employees affected by the Homeland Security Act of 2002. *See* Pub. L. 107-296, 116 Stat. 2135 (Nov. 25, 2002). News reports of the enactment of that legislation indicate that its Executive Branch proponents succeeded in obtaining additional authority to control the hiring, firing and transferring of federal employees, but only after making a number of substantive legislative compromises. *See, e.g.*, Christopher Lee & Stephen Barr, *New Agency, New Rules—and a Cost; Bush Gets Management Freedom, and a Measure of Mistrust Among Workers*, WASH. POST, Nov. 14, 2002, at A31. Under the NPS's approach, the Homeland Security Act's

proponents might have avoided those compromises merely by ensuring that their views were slipped into some convenient vessel of legislative history, or, worse still, the committee reports accompanying subsequent legislation. Simply put, "[c]ommittee report language is no longer simply a means of explaining the intent of new statutory language; it is now just as frequently used to impose the report writer's views on an agency in the absence of the votes necessary to pass a statutory change." *Watch Hill*, 2001 WL 170911, at *5 (rejecting NPS's position that legislative history can be used to exempt concession contracts from the CDA).

The D.C. Circuit's misuse of legislative history thus puts at risk, not just NPS concessions, or businesses with Government contracts, but anyone who relies on federal statutes to protect their relationships with a government agency—including federal agency employees. The D.C. Circuit's legislative history rationale is perhaps its most misguided grounds for its fundamentally misguided decision.

CONCLUSION

For the foregoing reasons, and those spelled out in the brief of petitioner NPHA, this Court should reverse the judgment of the court of appeals and vacate the NPS's regulations.

Respectfully submitted,

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